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ALEXANDER L. STEVAS,
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80-1425

No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

GEORGE WEISENSEE, PETITIONER

v.

THE SUPREME COURT OF SOUTH DAKOTA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

L. Anthony Weisensee
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Sioux Falls, S.D. 57102
Counsel for Petitioner

QUESTIONS PRESENTED

1. WHETHER THE COURT ERRED BY DENYING PETITIONER DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW BY PROCEEDING AGAINST HIM IN A STATE BAR DISCIPLINARY ACTION WITHOUT EVER CAUSING A FORMAL COMPLAINT TO BE FILED AGAINST HIM; BY LIMITING HIS ARGUMENTS BEFORE THE SUPREME COURT TO THE MATTER OF A CONVICTION ONLY AND THEN LATER MAKING ITS DECISION UPON SOME VAGUE AND UNASCERTAINABLE GROUND; BY SUBSTITUTING ONE JUDGE FOR ANOTHER AT THE END OF ALL PROCEEDINGS IN ORDER TO ESTABLISH A MAJORITY, WHICH IT COULD NOT OTHERWISE HAVE HAD; BY DISREGARDING AND COLLATERALLY OVERRULING THE JUDGMENTS AND FINDINGS OF THE TRIAL COURT WHICH HAD CLEAR JURISDICTION OVER THE FUNDAMENTAL ISSUE UPON WHICH THE DISBARMENT WAS BASED, THE QUESTION OF CONVICTION; BY DISREGARDING THE FINDINGS AND RECOMMENDATIONS OF THE STATE BAR DISCIPLINARY BOARD, WHICH HAD STATUTORY RIGHTS TO PARTICIPATE AND WHICH HAD BEEN APPOINTED BY THE COURT AS ITS FACT FINDER; BY DISREGARDING AND OVERRULING THE PLAIN AND OBVIOUS INTENT OF MATERIAL STATUTORY LAW; BY PERMITTING THE CHIEF JUSTICE TO ARBITRARILY DENY A REHEARING WITHOUT OBTAINING ANY VOTE OF THE FULL AND PROPER COURT ON THAT ISSUE AND BY ENTERING AN AMENDED JUDGMENT WHICH DELETED A MAJOR STATED CAUSE FOR DISBARMENT, WHILE AT THE SAME TIME DENYING A REHEARING REGARDING THAT VERY MATTER.

2. WHETHER THE COURT ERRED AND DENIED PETITIONER HIS RIGHT NOT TO HAVE HIS AGREEMENT WITH THE TRIAL COURT AND WITH THE STATE ABRIDGED UNDER ARTICLE 1, SECTION 10, OF THE UNITED STATES CONSTITUTION, BY THE SOUTH DAKOTA SUPREME COURT.

George Weisensee petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of South Dakota disbarring Petitioner over the express recommendations of the fact finding board which statutorily shared jurisdiction with the State Court, and in disregard of statutes which prohibit disqualification of persons invoking a plea bargain and suspended imposition provisions of state penal statutes, and without a formal accusation, and by the device of substituting an alternative judge to join in a purported majority for an absent member of the court who duly participated in the prior hearing. The petition presents a significant question not heretofore determined of the applicability of the equal protection clause to lawyers as a class of persons, and of the due process clause to the discipline of lawyers procedurally. The state court's decision represents a substantial departure from applicable decisions of this Court.

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OPINION BELOW

The opinion of the Supreme Court of the State of South Dakota is reported at 296 N.W.2d 717. The opinion is reproduced in the Appendix herein (Appendix, p. A-1)

JURISDICTION

This was an original proceeding in the South Dakota Supreme Court, commenced by an "Order of Suspension" to Petitioner and based on a purported "conviction." An amended judgment of disbarment was entered on November 6, 1980, on the same date that a Petition for Rehearing on initial Judgment of Disbarment of September 11, 1980, was denied. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment 14, § 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Article 1, § 10 (paragraph 1)

> "No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of

debts; pass any bill of attainder, ex post facto law, or law impairing the obligations of contracts or grant any title of nobility."

STATUTES INVOLVED

S.D.C.L. herein refers to South Dakota Codified Law.

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STATEMENT

Appendix A, the decision of the Court, substantially related the procedural history of this case. However, any reference by the Supreme Court to the Trial Court having made an adjudication of guilt is merely a conclusion of the Supreme Court and is not admitted by the petitioner.

Also attention is called to the fact that the matter was disposed of in the Trial Court as a misdemeanor and not as a felony. (3A)

It should also be pointed out that the disposition of the criminal matter herein, was made by the Trial Court before a hearing was had in the Supreme Court. It should also be pointed out that the Trial Court's decision and disposition was not before the Supreme Court on appeal. The Supreme Court made its findings and interpretation of the acts of

the Trial Court collaterally.

The federal questions were raised in the Petitioner's responsive pleading to the second recommendation of the disciplinary board, which pleading was in affidavit form, dated February 7, 1980. The issues were raised by the claim that petitioner would be denied due process and equal protection if he were denied the protection and benefit of the statute guaranteeing that no disqualification would be imposed against a person entering into a plea agreement for a suspended imposition of sentence. Petitioner complained that the Court, by disbarring him, would deprive him of the statutorily granted immunity from such disqualification, and that "to be selective in the application would be to deny due process and equal protection" (South Dakota Constitution has no equal protection clause). The invocation of the 14th Amendment appears on page 3 of Petitioner's Affidavit of February 7, 1980. It is a part of the record of this case, all of which will be certified to this Court. The issues were not passed upon at all by the majority opinion of the state court, but instead were ignored and never referred to, except in the dissenting opinion which correctly states that the law required that Petitioner be given the benefit of the immunity conferred by statute. "This lawyer has a right to rely on a plea bargain not unlike any other citizen." (Henderson, J., dissenting, 296 N.W.2d at 724).

REASONS FOR GRANTING THE WRIT

Although the errors herein described on the part of the South Dakota Supreme Court at this stage appear to apply only to this Petitioner, the results and ramifications hereof are of far reaching significance if they are allowed to go unchecked. Presented here are such substantial questions as to whether the State Court can disregard the clear intent of a statute or to apply the statute selectively and whether the Court can overrule another Court which has competent jurisdiction and whether a State Court can disregard the findings of its own fact finding body. Also presented are matters of important procedural due process of law in respect to its three important facets (1) The question of whether the Court had sufficient facts before it to exercise jurisdiction. (2) Whether there was reasonable notice given. (3) Whether there was a fair hearing made. The record here is such that it is subject to question as to its fairness throughout. If a State Court has such awesome powers as to one individual, what is to stop such a Court from repeating these objectional practices over and over again?

1. WHETHER THE COURT ERRED BY DENYING PETITIONER DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW BY PROCEEDING AGAINST HIM IN A STATE BAR DISCIPLINARY ACTION WITHOUT EVER CAUSING A FORMAL COMPLAINT TO BE FILED AGAINST HIM; BY LIMITING HIS ARGUMENTS BEFORE THE SUPREME COURT TO THE MATTER OF A CONVICTION ONLY AND THEN LATER MAKING ITS DECISION UPON SOME VAGUE AND UNASCERTAINABLE GROUND; BY SUBSTITUTING ONE JUDGE FOR ANOTHER AT THE END OF ALL PROCEEDINGS IN ORDER TO ESTABLISH A MAJORITY, WHICH IT COULD NOT OTHERWISE HAVE HAD; BY DISREGARDING AND COLLATERALLY OVERRULING THE JUDGMENTS AND FINDINGS OF THE TRIAL COURT WHICH HAD CLEAR JURISDICTION OVER THE FUNDAMENTAL ISSUE UPON WHICH THE DISBARMENT WAS BASED, THE QUESTION OF CONVICTION: BY DISREGARDING THE FINDINGS AND RECOMMENDATIONS OF THE STATE BAR DISCIPLINARY BOARD, WHICH HAD STATUTORY RIGHTS TO PARTICIPATE AND WHICH HAD BEEN APPOINTED BY THE COURT AS ITS FACT FINDER; BY DISREGARDING AND OVERRULING THE PLAIN AND OBVIOUS INTENT OF MATERIAL STATUTORY LAW; BY PERMITTING THE CHIEF JUSTICE TO ARBITRARILY DENY A REHEARING WITHOUT OBTAINING ANY VOTE OF THE FULL AND PROPER COURT ON THAT ISSUE AND BY ENTERING AN AMENDED JUDGMENT WHICH DELETED A MAJOR STATED CAUSE FOR DISBARMENT, WHILE AT THE SAME TIME DENYING A REHEARING REGARDING THAT VERY MATTER?

Although a State Supreme Court may claim in some instances such as this, the exclusive power to disbar attorneys, that should not be interpreted to mean the unlimited power to disbar nor should it be interpreted to mean that it can exclude other parties who have a statutory right to be involved in the process, such as the State Bar Disciplinary Board had in this case, as is hereinafter set out.

That this Court has jurisdiction of the matter is established in the following cases, In re Summers, 325 U.S. 561 (1945). Konigsberg v. State Bar of California, 353 U. S. 252 (1957). Schware V. Board of Bar Examiners of the State of New Mexico, 353 U.S. 232 (1957).

In Konigsberg, supra, (at page 273) the Court said:

> "We recognise the importance of leaving states free to select their own bars, but it is equally important the state not exercise this power in an arbitrary or discriminatory manner nor in such way as to impinge on the freedom of political expression or association."

In that case the majority of the court found that the evidence did not support the findings and that the petitioner had been denied due process of law. The same is true here. It must be pointed out that the South Dakota Supreme Court had nothing before it except the Findings of the State Bar and those of the Trial Court, none of which were unfavorable to the petitioner. The petitioner at no time ever admitted guilt and only stipulated that certain evidence could be admitted under an agreement whereby he would be afforded all the rights and privileges due him under the law. It should also be pointed out that the State Bar Disciplinary Board had made its recommendations of disbarment before it had ever even conducted a hearing of the matter. After it had once held such a hearing the Board totally reversed itself and recommended that there be no disbarment. The Board's findings also indicated that petitioner's culpability was not as great as it previously had appeared and that basically the problem had been one of alcoholism, which problem had been arrested for some 22 months and appeared to be well on its way toward being permanently resolved. (Appendix 4A) Although a reviewing Court, in a disciplinary proceeding, may look beyond a conviction, in the present case there was no

conviction and what is more, the only damaging evidence was admitted in the Trial Court upon the stipulation of the parties and only for a limited purpose. The Court did not properly consider that evidence under the circumstances, without abrogating the purposes for which it was consented to. It was part of an agreement, a plea bargain, a contract which should have been binding upon the state as well as upon the defendant.

In the case of Schware v. Board of Bar Examiners of the State of New Mexico, 353 U. S. 232, the Court said,

> "A state cannot exclude a person from his practice of law or from any other occupation in a manner or for reasons that contravene The Due Process or Equal Protection Clause of the 14th Amendment." (page 238)

On September 17, 1980, a decision and judgment were entered in the office of the Clerk of the South Dakota Supreme Court, purporting to disbar the Petitioner from practicing law in the State of South Dakota. That said decision and judgment are void and constitute a violation of Petitioner's rights, privileges and immunities secured by the Constitution and laws of the United States and of the State of South Dakota and more particularly Article 1, Section 10 of the United States Constitution and the Fourteenth Amendment thereto, in the following particulars: A. The disciplinary proceedings against the Petitioner were carried out without there ever having been served or filed a formal complaint as required by South Dakota Codified Laws (hereinafter called S.D.C.L.) 16-19-64 and 67, and as required under due process of law.

S.D.C.L. 16-19-64 reads as follows:

> "Provisions governing formal disciplinary Proceedings. Formal disciplinary proceedings shall be conducted pursuant to §§16-19-67 to 16-19-70, inclusive."

S.D.C.L. 16-19-67 reads as follows:

"Direction to file formal accusation-Further investigation-Agency conducting formal proceedings. If, upon the initiation of an investigation and after findings and a report are filed as provided in §§16-19-45 to 16-19-64, inclusive, the report contains a recommendation that formal disciplinary proceedings be instituted, the Supreme Court shall direct either the board or the attorney general to prepare and file a formal accusation and serve the same upon the accused attorney in such a manner as the Court may direct. However, if it appears from the report that there is an insufficent factual basis to warrant formal disciplinary proceedings, the Court may refer the matter to the board or to the attorney general for further investigation.

In all cases, the further conduct of the formal disciplinary proceedings on behalf of the Court and the complainant, if there be one, shall be in charge of either the board or the attorney general, whichever may have been directed by the Court to prepare and file said formal accusation."

B. That said Decision and Judgment were based upon an alleged conviction of a crime and an adjudication of guilt, when in fact there was not, as a matter of law, either a conviction of a crime nor an adjudication of guilt. The purported majority of the Court, the opinion of Chief Justice Roger L. Wollman, joined in by Justice Robert E. Morgan and Judge Philo I. Hall totally ignored the dissenting opinions of Justice Frank E. Henderson and Justice Jon Fosheim, and ignored the controlling statutes (hereinafter cited) in total defiance of the obvious intent of the South Dakota Legislature, and undermined and thwarted the efforts of the trial judge, the Honorable Irvin N. Hoyt, Circuit Judge, in his efforts to carry out his duty to uphold the Constitution and the statutes of the United States and of the State of South Dakota, as hereinafter more particularly set out.

The criminal charge against this Petitioner was dismissed by Judge Hoyt. (Appendix G)
C. The Disciplinary Board of the State Bar of South Dakota had concurrent jurisdiction with the Supreme Court regarding the discipline of attorneys under S.D.C.L. 16-19-21 and 29(1) and was appointed by said Court to make an investigation and a recommendation to the Court regarding the matter involving this Petitioner.

S.D.C.L. 16-19-21 reads as follows:

> "Attorneys subject to discipline by Supreme Court and board. Any attorney admitted to practice law in this state and any attorney specially admitted by a court of this state for a particular proceeding is subject to the exclusive disciplinary jurisdiction of the Supreme Court and the board established by §16-19-24."

S.D.C.L. 16-19-29(1) reads as follows:

> "Powers and duties of disciplinary board generally. The board shall exercise the powers and perform the duties conferred and imposed upon it by rule of the Supreme Court, including the power and duty:
>
> (1) To consider and investigate any alleged ground for discipline or alleged incapacity of any attorney called to its attention, or upon its own motion, and to take such action with respect thereto as shall be appropriate to effectuate the purposes of this chapter."

Said board, after it had completed all investigation and having held a hearing, unanimously reversed itself and recommended that Petitioner not be disbarred and made a finding of fact that "the respondent's [Petitioner's] actual knowledge and participation in the events which lead to

the criminal charges against him were not as culpable as it would appear from the bare record." (Appendix 4a)

The Supreme Court, nevertheless, arbitrarily disregarded this finding as well as all the other findings of the Disciplinary Board, even though said findings were undisputed.

D. In the early stages of this matter Justice Dunn disqualified himself. Thereupon, Chief Justice Wollman appointed the Honorable George Wuest, Circuit Judge, to replace Justice Dunn. Judge Wuest then sat at the hearing of this matter before the Supreme Court on November 9, 1979, and heard the arguments of counsel. Thereafter, at the arbitrary instance of Justice Wollman, Judge Hall replaced Judge Wuest and joined in the majority opinion for disbarment of the Petitioner. Judge Hall was an interloper, acting without any authority of law; without jurisdiction so to act; without any notice to either the State Bar or to the Petitioner and without even having heard the oral arguments of counsel, although the Supreme Court in its Judgment stated,

> ..."The reports of the Disciplinary Board, the answers of the respondent and the argument of the parties were thoroughly considered by the Court."...

Without Judge Hall's unlawfully replacing Judge Wuest and joining in the alleged majority opinion of the Court, there would be no "majority" opinion and the Petitioner would have been entitled to have the matter dropped. Instead, this matter has been dragged out for nearly three years, although the Petitioner is clearly free of any criminal guilt, as a matter of law.

Referring to substitute judges the Wisconsin Supreme Court said,

> "A judge who did not hear the evidence can not make any finding of fact nor render a valid judgment in a cause tried before his predecessor, notwithstanding the testimony may have been written down and preserved."
> Cram v. Bach, 83 N.W.2d 877 (Wis. 1957)

See also State v. Sereg, 296 N.W. 231 (Iowa, 1941); Freeman v. United States, 227 Fed. 732 (2d Cir. 1915) Wiedemann v. Wiedemann, 36 N.W.2d 810 (Minn. 1949); State ex rel Johnson v. Thompson, 34 N.W.2d 80 (North Dakota 1948); State ex rel LaJesse v. Meiseinger, 103 N.W.2d 864 (Minn. 1960).

The Chief Justice of the Supreme Court of South Dakota may have the authority to fill vacancies on the Court, but having already substituted one judge, he should not be able to repeat the process and replace him with another, where the first replacement sat at the hearing and the second did not. He can not create vacancies at will.

E. At the hearing before the Supreme Court, the Petitioner advised the Court of his present status and of the fact that he had completed a probationary period and had been discharged by the trial court and that the charge was dismissed against him. Justice Wollman then advised the Petitioner that he was to be limited in his argument and could not "go behind the conviction" and that the matter would then be referred back to the Disciplinary Board. The Court, at that point, narrowed the issue to whether or not there had been a conviction.

After the hearing held before the Disciplinary Board on April 25, 1980, and referred to as a "due process hearing" the Court had nothing before it to decide except whether the Petitioner herein was

fit to practice law due to the alleged conviction.

Under the law of the case, there was no conviction. And under the facts of the case, the Disciplinary Board found the Petitioner fit to practice law. The alleged majority of the Supreme Court simply exercised power under color of law in entering its decision, while totally disregarding matters of jurisdiction and of constitutional rights.

F. After the said Judgment and Decision of Disbarment were entered, the Trial Judge, Irvin N. Hoyt, entered specific Findings of Fact and Conclusions of Law (Appendix F) and an Amended Judgment (Appendix C), whereby an obvious misapprehension of the law and the facts by the Supreme Court relating to the matter before the Circuit Court, were corrected and set straight, showing that the Circuit Court clearly did not intend its application of the probationary statutes to be an exceptional application, and showing that the Petitioner waived his right to a jury trial relying on the agreement with the court, and showing that the trial court specifically intended that there was no adjudication of guilt and no conviction, and showing clearly that the application of said probationary statutes had, in fact, accomplished exactly what the legislature plainly had intended such statutes to accomplish.

Thereupon, on October 6, 1980, Petitioner filed an application for a rehearing of its decision and judgment pursuant to S.D.C.L. 15-25-3, on the ground that said court had misapprehended the law and the facts, calling attention to the Circuit Court's Nunc Pro Tunc Findings of Fact and Conclusions of Law and Amended Judgment, among other matters.

S.D.C.L. 15-25-3 reads as follows:

"Petition for rehearing on decision. Any party may petition for a rehearing upon a decision, in the event that any issue or question of law or fact appears to have been overlooked or misapprehended by the court, by filing and service of such petition at any time within twenty days after copy of the decision has been mailed or delivered by the clerk. Such petition shall state briefly and without arguement the issue, fact or law claimed to have been overlooked or misapprehended by the court."

The Order of Chief Justice Wollman, dated November 6, 1980, denied said rehearing, thereby perpetuating the unconstitutional Decision and Judgment of Disbarment. The legislative intent was carried out by the Circuit Court, which had jurisdiction so to do. The Supreme Court dishonored and interfered with that jurisdiction without any right to do so, whatsoever, and the Petitioner herein was forced into a class all by himself, without any justice and without due process of law: without the right to depend on the Circuit Court's plea bargain.

G. The Judgment of Disbarment contained a reference to a "felony conviction," as a basis for disbarment. There was neither a felony nor a conviction. Therefore, the Judgment on its fact shows a gross misapprehension of the law and the facts. After the same was brought to the attention of the court upon the Petition for Rehearing, Chief Justice Roger L. Wollman, acting under color of authority and acting for himself only, arbitrarily amended said judgment so as to delete the words "felony conviction" thereby admitting the serious error, without correcting the substantive error and the damage it had caused, and in addition, entered an order denying Petitioner's Petition for Rehearing, without ascertaining the individual

vote or choice of each qualified member of the court and without determining that a rehearing had actually been denied. The Petitioner was thereby denied due process of law and equal protection of the law.

H. Two Justices dissented in the decision filed with the Clerk of the Supreme Court. Justice Frank E. Henderson, acting within his jurisdiction, made a proper dissent and stated the true law and facts of the case. Among those are four jurisdictional matters which relate to the due process of law and equal protection of the law and to constitutional rights to contract, which are substantially as follows:

1. If the trial court made a finding of guilt, then its action was void ab initio under the statutes involved.

2. If it was not intended by the trial court to make an exception to the statutes, (and it was not) then the Petitioner herein is entitled to all the benefits of said statutes that other persons are entitled to and there was therefore no conviction and no adjudication of guilt.

3. That there was a plea bargain involved. [S.D.C.L. 23A-27-13 requires the consent of the accused to come under that statute.] Therefore, all of the parties thereto, as well as society itself, has a right to have that plea bargain carried out in all matters of substance. The Petitioner waived his right to a jury trial in reliance upon it.

4. All other grievances had been removed and since the conviction relied upon does not exist, there is not question as to Petitioner's fitness to practice law, and there was nothing left for the court to decide.

I. The South Dakota statutes relied upon by

Circuit Judge Irvin N. Hoyt, and also by the State Attorney General's Office and by the Petitioner (defendant therein) in their plea bargain to be controlling in the disposition of that matter were:

S.D.C.L. 23A-27-13 which provides in part:

..."A court having jurisdiction of the defendant, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby may, without entering a judgment of guilt, and with the consent of the defendant, suspend the imposition of sentence and place the defendant on probation for such period and upon such terms and conditions as the court may deem best."...

S.D.C.L. 23A-27-14 provides in part:

..."Discharge and dismissal under this section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime."...

S.D.C.L. 23A-27-17 provides:

"Upon the discharge and dismissal of a person pursuant to § 23A-27-14, a court shall order that all official records, other than the nonpublic records to be retained by the division of criminal investigation, be sealed along with all records relating to the person's arrest, indictment or information, trial, finding of guilt, and dismissal and discharge. The effect of such order is to restore such person, in the contemplation of the law, to the status he occupied before his arrest or indictment or information.

> No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or of giving false statement by reason of his failure to recite or acknowledge such arrest, indictment or information, or trial in response to any inquiry made of him for any purpose."

In construing statutes it is well settled that the Courts must look to the true intent of the law. The legislature may define, in a statute, words or phrases used therein and may declare in the body of any act the construction to be placed thereon. Van Antwerp v. State, 55 N.W.2d 108 (Mich. 1952); Gilson Bros. Co. v. Worden-Allen Co., 265 N.W. 217 (Wis. 1936); Young v. O'Keefe, 69 N.W.2d 534 (Iowa 1955); Cowman v. Hanson, 92 N.W.2d 682 (Iowa 1958).

J. The Court regularly applied and gives effect to S.D.C.L. 23A-27-13, 14 and 17, in all other cases, but in this instance have repealed said statutes as against this Petitioner only, constituting a deprivation of equal protection of the laws. State v. Iverson, 269 N.W.2d 390 (S.S. 1978), and State v. Johnson, 254 N.W.2d 114 (S.D. 1977).

2. WHETHER THE COURT ERRED AND DENIED PETITIONER HIS RIGHT NOT TO HAVE HIS AGREEMENT WITH THE TRIAL COURT AND WITH THE STATE ABRIDGED UNDER ARTICLE 1, SECTION 10, OF THE UNITED STATES CONSTITUTION, BY THE SOUTH DAKOTA STATE SUPREME COURT.

A. The Supreme Court of South Dakota has insisted that the trial court made an adjudication of guilt when the trial court, acting within its clear jurisdiction and power, not only did not make such an adjudication of guilt, but

has affirmatively and pointedly rejected any inference that it had done so, and clarified the record to make sure that it had not done so, but had followed the intent of the statutes involved. (Appendix F) The two courts are at diametrically opposite poles. If the trial court had the jurisdiction to do what it did, then the Supreme Court could not possibly have had the jurisdiction to do what it did for the reasons it gave. The State Supreme Court arbitrarily abridged the plea bargain agreement which was relied upon by all parties thereto.

B. The Plaintiff has sustained and will sustain irreparable damage to his freedom and right to earn a living, to his character and reputation, to his ability to support his family, has been deprived of liberty or privilege to practice law and is not merely a challenge to the State Supreme Court's jurisdiction to discipline attorneys, but involves Petitioner's right to be free from the stigma of having been convicted of a crime when has has not been and a right to be free from having been disbarred based upon the spurious and false conviction and the right to be free from having permanent records of a State Court and of legal publications of such records, all based upon an adjudication of guilt of a crime, which adjudication of guilt does not exist, as a matter of law. Petitioner has also suffered and will continue to suffer civil disabilities as a consequence of said Judgment and Decision of Disbarment, such as, but not limited to: S.D.C.L. 16-18-6, which imposes disabilities upon a disbarred attorney far beyond the practice of law

S.D.C.L. 16-18-6 reads as follows:

"Contracts and powers of disbarred attorney void. Any contract, power of attorney, or other instrument authorizing, directing, or

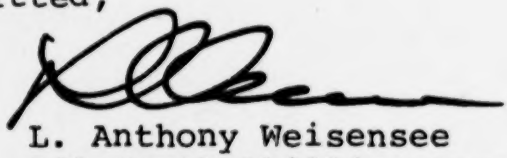
empowering, or attempting to authorize, direct or empower any person whose license to practice law in the State of South Dakota has been revoked, to institute or attempt to institute any legal proceedings in any court of this state in behalf of the person or persons executing such power of attorney, contract, or other instrument, shall be and the same is hereby declared to be null and void."

CONCLUSION

The result to this Petitioner is irreparable, permanent and devastating harm. The alleged majority of the Court, in disregard of Petitioner's constitutional and statutory rights, and under color of law, defied the clear mandate of codified law, and arbitrarily and capriciously stripped the Petitioner of his license to practice.

For all the reasons stated the judgment of the State Court should be reversed. The petition for writ of certiorari should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have this day served three copies of the within and foregoing Brief of Appellant upon Mr. R. James Zieser, Attorney for the South Dakota State Bar Disciplinary Board, Tyndall, South Dakota 57066, and three copies of the within and foregoing Brief of Appellant upon Ms. Gloria Engel, Clerk of the South Dakota Supreme Court, Pierre, South Dakota 57501, and three copies of the within and foregoing Brief of the Appellant upon Mr. Mark Meierhenry, Attorney General for the State of South Dakota, Pierre, South Dakota 57501, all the parties required to be served, upon depositing the same in the United States mail in a properly addressed envelope with air mail postage affixed thereon to insure delivery.

Dated this 2nd day of February, 1981.

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APPENDIX A

MATTER OF WEISENSEE
Cite as, S.D., 296 N.W.2d 717

In the Matter of the Discipline of

George WEISENSEE, as an
Attorney at Law.

No. 12929

Supreme Court of South Dakota.

Sept. 17, 1980.

In disciplinary proceedings, the Supreme Court, Wollman, C.J., held that participation in attempted disposition of mortgaged vehicle warrants disbarments.

Disbarment ordered.

Henderson, J., dissented and filed opinion.

Fosheim, J., dissented and filed opinion.

1. Attorney and Client - 39
Violation of statute prohibiting sale of motor vehicle subject to chattel mortgage and attempt to commit violation of such statute are "serious crimes" within definition of that term for purposes of enumerating attorney misconduct that is grounds for discipline. SDCL 16-19-33, 16-19-36, 32-3-47.
See publication Words and Phrases for other judicial constructions and definitions.

2. Attorney and Client - 39

Even though trial court dismissed proceedings against attorney upon completion of conditions of probation, dismissal did not vitiate disciplinary proceedings based upon his conviction, in that trial court order suspending imposition of sentence contained adjudication of guilt; possible institution of disciplinary proceedings was not one of disqualifications and disabilitites released by order of discharge and dismissal. SDCL 23A-27-13, 23A-27-14.

3. Attorney and Client - 58

Participation in attemped disposition of mortgaged vehicle can only be characterized as constituting dishonesty, misappropriation, and form of theft and warrants disbarment. SDCL 16-19-33, 16-19-36, 32-3-47.

R. James Zieser, Tyndall, for Disciplinary Board, The State Bar of South Dakota, for complainant.

George Weisensee, pro se.

WOLLMAN, Chief Justice.

Following receipt of a certified copy of an order adjudging George Weisensee (respondent) guilty of the offense of attempted disposal of mortgaged property, we entered an order pursuant to SDCL 16-19-37 on April 17, 1979, suspending respondent from the practice of law pending final disposition of disciplinary proceedings against him. Those proceedings having been completed, we now determine that respondent must be disbarred.

Respondent and one Conroy Langloss were charged by information with the crime of attempting to dispose of mortgaged property, a violation of SDCL 32-3-47. In pertinent part the information charged:

> That on or about the 16th day of December, 1977, in the County of Minnehaha, State of South Dakota, George Weisensee and Conroy Langloss did commit the public offense of Attempting to Dispose of Mortgaged Property, a violation of SDCL 32-3-47 in that Conroy Langloss and George Weisensee did, knowingly, willfully, and with intent to defraud, attempt to permanently dispose of a 1977 Ford pickup, Vehicle Identification Number 484343862, by selling it to Marc Norlin, without having first obtained the written permission of Ford Motor Credit Corporation, who held a lien on that vehicle, and without discharging or performing the conditions imposed by that lien.

On September 11, 1978, respondent, accompanied by counsel, and Langloss appeared before the circuit court and waived preliminary hearing, whereupon the State offered to present a stipulation of facts prepared pursuant to a plea bargain agreed to by respondent. Before permitting the State to proceed, the trial court asked respondent's counsel whether he would stipulate that the facts contained in the stipulation would be those adduced if the State went to trial, to which counsel replied:

> BY MR. BURKE: Your Honor, I am fully aware and so is Mr. Weisensee. We have had first hand contact with the facts that

the State is going to ask to be stipulated to and we will stipulate that if their witnesses were called in any sequence that they would testify in substance as Mr. Wilbur is going to state to the Court.

The State then read the following statement into the record:

BY MR. WILBUR: All right, Your Honor. The State would first prove that sometime in the first two (2) weeks in December, 1977, Mr. Marc Norlin, who is employed by a real estate agent in Sioux Falls and who is a part time policeman for the City of Sioux Falls, had a contact with Mr. George Weisensee concerning the purchase of a pick-up at less than the usual rate. The State would also prove that on December 15, 1977, George Weisensee contacted Mr. Norlin and told him that he had such a pickup truck available. He expected the truck to be coming from Iowa that evening and would call Norlin back. On December 16th, Weisensee called Norlin at Dean Pearson Realty. They had another discussion concerning the vehicle and pursuant to that discussion they met at the Red Rock Lounge at the Airport Holiday Inn at 3:30 P.M. on December 16th. That afternoon we would prove that Mr. Weisensee, Mr. Norlin and Mr. Langloss met at the Holiday Inn. Upon arrival Mr. Weisensee inquired of Mr. Norlin if he was wired up or if he had any contact with the police officers. Mr. Norlin denied that. They then discussed the purchase of a vehicle. Langloss and Weisensee explained they were asking Twenty-Five Hundred ($2500.00) Dollars for the vehicle, which was a 1977 Ford One-Half (1/2) Ton Pick-up, Four Wheel Drive.

It was approximately two (2) months old at the time. They said they would take no checks. They wanted cash and at that time Mr. Weisensee stated that there was a problem with the title to the vehicle and Mr. Norlin would have to acquire a title by himself. There was some discussion concerning the fact that the pickup was "hot". Mr. Langloss suggested to Norlin that he bring a new set of license plates for the pickup because he was going to remove the plates that were on the pickup truck at the time of the sale. They agrees to meet at 6:00 P.M. with the vehicle for the inspection of the vehicle. Before that time Sioux Falls Police acquired Twenty Five Hundred ($2500.00) Dollars, had the money marked with fluorescent ink and recorded as to serial number. At 6:30 P.M. Mr. Norlin met Weisensee and Langloss at the Airport Holiday Inn and they then had some discussion concerning buying the pickup. They went outside to inspect it and pursuant to the inspection Mr. Norlin gave the defendants Langloss and Weisensee nineteen (19) One Hundred ($100.00) Dollar bills and at that time Langloss took the money and Weisensee gave the pickup keys to Norlin. There were further statements by both Mr. Weisensee and Mr. Langloss concerning the fact that it would be best to have the pickup painted as soon as possible and the mud flaps should be removed because they are identifying characteristics. Pursuant to the vehicle changing hands the parties got up to leave and Officer Ed Flowers, Officer Hanson and Officer Clauson from the Sioux Falls Police arrested them. It was later determined

that the pickup at the time was registered to Mr. Larry Vibbard and his wife, Shirley Vibbard, at Belmont, Iowa and that there was a lien on the pickup. The lien was held by Ford Motor Credit Corporation of Des Moines, Iowa, who had given no permission for the sale or other disposal of that vehicle. The State would also prove that Mr. Vibbard stated that he had, in fact, lended [sic] the pickup to Mr. Langloss. Pursuant to the arrest let's see both parties declined to make any statements. That would conclude the facts that the State would elicit during it's [sic] case in chief, I believe.

Following a conference between respondent and his counsel, the following colloquy took place:

BY MR. BURKE: The Defendant wants me to be certain to point out that he is not admitting these are the facts. I guess the record should show that. We are stipulating only that that is what their witnesses would testify to if they were called.

BY THE COURT: I understand that but it is my understanding that this procedure of stipulating to the facts, that this is what their witnesses would testify, is in lieu of entering a plea to this charge and, of course, these facts would then be used by the Court, if it is to be done this way, for a basis of a finding of either guilty or not guilty. Isn't that correct?

BY MR. BURKE: That is correct.

BY THE COURT: So I don't want to get cross roads here. That either he is stipulating that these are the facts that if these witnesses were to testify and that the Court can use these facts as a basis for entering any finding. Is that correct?

BY MR. BURKE: That is correct.
BY THE COURT: Is that correct, George?
BY MR. WEISENSEE: Yes, Your Honor.

The trail court then indicated that it had received a statement in the nature of a plea bargain that provided, among other things, that the State would dismiss the three grand theft charges and the conspiracy charge upon which respondent had been indicted and that in return for the reduction of the charge to a misdemeanor, respondent agreed to surrender to the Supreme Court his license to practice law.

On December 20, 1978, the trial court entered an order adjudging respondent to be guilty of the offense charged in the information. The order suspended the imposition of sentence against respondent and placed him on probation for a period of one year upon certain conditions, including the payment of a $500 fine, the payment of attorney fees and all outstanding checks, and the weekly attendance by respondent at Alcoholics Anonymous meetings. [1]

On November 8, 1979, the trial court entered an order modifying the December 20, 1978,

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1. The order was entered pursuant to SDCL 23-57-4. That statute was repealed (1978 S.D. Sess.Laws ch. 178, § 577, effective July 1, 1979), and was replaced by SDCL 23A-27-13, 14, 15 and 16 as enacted (1978 S.D.Sess.Laws ch. 178, § 345) and amended (1979 S.D.Sess.Laws ch. 159, §§ 16A, 17). With some exceptions, SDCL 23A-27-13,14,15 and 16 are substantially identical to the repealed statute.

order by eliminating the requirement of the payment of the fine and by providing that the period of probation should end on November 8, 1979. That same day the trial court entered an order dismissing the action and discharging respondent.

Following our order suspending respondent from the practice of law, we referred this matter to the Disciplinary Board of the State Bar (Board) for the institution of a formal proceeding relating to the extent of the final discipline to be imposed upon respondent. SDCL 15-19-39. The Board filed its report on May 3, 1979, recommending that respondent be disbarred. Following two extensions of time for answering granted to respondent's counsel, respondent on August 16, 1979, filed an answer on his own behalf. Respondent's counsel later withdrew as counsel of record.

A hearing on the Board's report and recommendation was set for October 15, 1979. Respondent failed to appear on that date, however, and in lieu of an appearance tendered his resignation from the State Bar. Respondent was advised that in view of the pending disciplinary action the Court would not accept his resignation. The hearing on the Board's report and recommendation was then rescheduled for November 9, 1979.

Respondent appeared pro se at the November 9, 1979, hearing, representing to the Court that he had refrained from using alcoholic beverages since January of 1978 and that he had for some time been employed by River Part, an alcohol and drug treatment center in Pierre, South Dakota, to establish programs in private industries to aid persons with alcohol or drug-

related problems. He stated that the events giving rise to the charge on which he had been adjudged guilty had occurred while he was under the influence of alcohol and that he had been drinking heavily prior to the incident in question. He also referred to the action that the trial court had taken the preceding day to discharge the proceedings against him.

Following the hearing, we entered an order directing respondent to file with the Court an affidavit setting forth the facts regarding his employment with River Park and his abstinence from the use of alcoholic beverages. We also remanded the matter to the Board for its consideration of the additional factual matters that had been presented to the Court by respondent at the hearing and requested that the Board file a supplemental report and recommendation.

On January 22, 1980, the Board filed a supplemental report confirming the fact that respondent had abstained from the use of alcohol for some 22 months and the fact that respondent was employed by River Park. The report disputed respondent's representations to the Court that he was under the influence of alcohol at the time the offense was committed. The Board renewed its recommendation that respondent be disbarred.

On February 11, 1980, respondent filed a lengthy affidavit challenging the adequacy and fairness of the Board's investigation and in effect denying his guilt of the charge that forms the basis of this proceeding.

On March 4, 1980, we granted the Board's

request that the matter be continued to allow the Board to afford respondent an opportunity to appear before it.

Following a meeting with respondent on April 25, 1980, the Board on May 12, 1980, submitted to the Court a supplemental report recommending that respondent be suspended from the practice of law for one year, that he be given credit for the time he had already spent under suspension, and that he then be reinstated upon the condition that for a period of five years respondent refrain entirely from the use of alcoholic beverages and that during that period he not commit any act that would constitute a violation of the Code of Professional Responsibility that would merit imposition of discipline pursuant to SDCL 16-19. The supplemental report set forth the Board's findings that for several years prior to the incident that led to his conviction on the charge in issue here, respondent had been a severe alcoholic; that respondent's actual knowledge of and participation in the events culminating in the criminal charges were not as culpable as would appear from the bare record; that respondent's counsel had specifically stated to the trial court at the time of the arraignment that the facts contained in the stipulation were not admitted to by respondent but constituted only what the States witnesses would testify to; that respondent's agreement to the plea bargain was to a certain degree motivated by his alcoholism and with the understanding that upon the ultimate satisfactory compliance with the terms of probation his record would be sealed and purged and that he would not stand guilty of a serious crime. The Board also found that respondent had not used alcoholic beverages

of any kind since February 1, 1978, and that he has been actively involved in alcoholic rehabilitation at River Park, first on a full-time basis and more recently, because of program reductions, on a part-time basis.

SDCL 16-19-33 provides in part that:

> The following shall similarly constitute misconduct and shall be grounds for discipline:
> (1) Conviction of a crime as set forth in § 16-19-36. . . .

SDCL 16-19-36 provides in part:

> The term "serious crime" shall include any felony and any lesser crime a necessary element of which, as determined by the statutory or common law definition of such crime, involves improper conduct as an attorney, interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a serious crime.

The statute that respondent was found guilty of having violation provides in part:

> When the ownership of a motor vehicle . . . is subject to a chattel mortgage . . . it shall be unlawful, prior to the performance of the conditions contained in any of the above instruments and the discharge of the obligations imposed thereby, to intentionally or with intent to defraud, materially injure, destroy, conceal, sell, mortgage, or otherwise dispose of . . . . a motor vehicle . . subject to any of the above instruments without first having

> received the written permission of the then owner or holder of such chattel mortgage . . . Whoever shall violate this section shall be guilty of a Class 6 felony.

SDCL 32-3-47.

[1] We think that there can be no serious question that a violation of the foregoing statute is a serious crime as that term is defined in SDCL 16-19-36. So also an attempt to commit a violation of that statute.

[2] Respondent raised in his appearance before this Court on November 9, 1979, and in the affidavit filed on February 11, 1980, the contention that the dismissal of the proceedings against him by the trial court pursuant to SDCL 23A-27-14 in effect vitiated the disciplinary proceedings based upon his conviction. We do not agree.

SDCL 23A-27-13 provides that in certain cases the trial court may, without entering judgment of guilt, suspend the imposition of sentence and place a defendant on probation. SDCL 23A-27-14 provides that upon the completion of the conditions of probation, the court shall discharge the defendant. Such discharge and dismissal "shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime".

In State v. Iverson, 269 N.W.2d 390 (S.D. 1978), and State v. Johnson, 254 N.W.2d 114 (S.D.1977), we held that a plea of guilty resulting in probation without entry of judgment of guilt is not a conviction. Whatever

our holding might have been had the trial court in the instant case elected not to adjudge respondent guilty, we are faced with the fact that the order suspending imposition of sentence contained the following adjudication of guilt:

JUDGMENT of this Court that the Defendant is GUILTY of Attempted Disposal of Mortgage [sic] Property in violation of SDCL 32-3-47.

Thus the holdings in the Iverson and Johnson cases are inapposite here. Likewise, whatever disqualifications and disabilities are released by an order of discharge and dismissal entered pursuant to SDCL 23A-27-14, the possible institution of disciplinary proceedings is not among them. See, e.g., Meyer v. Board of Medical Examiners, 34 Cal.2d 62, 206 P.2d 1085 (1949); In re Phillips, 17 Cal.2d 55, 109 P.2d 344 (1941); and Patt v. Nevada State Bd. of Accountancy, 571 P.2d 105 (Nev.1977).

The question, then, is the extent of the discipline to be imposed upon respondent.

Respondent was admitted to the practice of law in this state on January 30, 1957. He has practiced law in Sioux Falls since that time, serving as Minnehaha County State's Attorney from January 1969 to December 1972. This is respondent's second appearance before this Court in a disciplinary matter. See In re Weisensee, 88 S.D. 544, 224 N.W.2d 830 (1975). In that case, we held that under our disciplinary rules then in effect respondent's conviction in United States District Court on a charge of failing to file a federal income tax return did not necessarily constitute a crime involving moral turpitude. We therefore dismissed the proceedings against respondent.[2]

2. Under our present rules, the willful failure to file an income tax return is a crime that would constitute grounds for disbarment or suspension. SDCL 16-19-33; SDCL 16-19-36.

The principles governing the imposition of discipline upon an attorney were recently restated in Matter of Voorhees, 294 N.W.2d 646 (S.D.1980). As we said in an earlier case:

> The purpose of a disciplinary proceeding is not to punish an attorney but to remove from the profession a person whose misconduct has proved him unfit to be entrusted with the duties and responsibilities belonging to the office of an attorney . . . and for the purpose of protecting the public from further wrongdoing on the part of an attorney . . .. Disbarment is warranted when it is clear that the protection of society requires such action or when the maintenance of the respect due courts and judges or of the respectability of the legal profession itself demands such action. . .

In re Kunkle, 88 S.D. 269,295,218 N.W.2d 521, 536(1974)(citations omitted). See also Matter of Parker, 269 N.W.2d 779 (S.D. 1978); Matter of Walker, 254 N.W.2d 452 (S.D.1977); In re Rude, 88 S.D. 416, 221 N.W.2d 43 (1974).

[3] We conclude that respondent's participation in the attemped disposition of the mortgaged vehicle can only be characterized as constituting dishonesty, misappropriation, and a form of theft. What the Court said in Matter of Parker, supra, is pertinent here:

> To determine whether discipline other than disbarment would be appropriate, the circumstances surrounding the conviction will be considered, i.e., whether the conduct involved dishonesty, fraud, deceit, or misrepresentation; whether the conduct is prejudicial to the administration of justice; whether the conduct adversely reflects upon the attorney's integrity, competency or

fitness to practice law. The respondent here has not presented any evidence which would convince this court that the circumstances leading to his felony conviction did not involve such conduct.

269 N.W.2d at 780-781.

We are not unmindful that respondent's violation of the law may in large part have been precipitated by the circumstances resulting from his addiction to alcohol. We are also aware of the fact that it is the announced policy of this state that alcoholics be afforded treatment rather than to be subjected to criminal prosecution. SDCL 34-20A-1. But as we said in Matter of Walker, supra:

This court cannot, however, under the guise of support of this policy condone misconduct on the part of an attorney on the grounds that he is an alcoholic anymore than it can condone misappropriation of clients' funds on the grounds of financial problems. To hold otherwise would wreak havoc with the process of disciplinary proceedings for not infrequently misconduct by attorneys appears to be attributable at least in part to the factor of alcoholism.

254 N.W.2d at 455.

Likewise, we cannot accept respondent's contention that he is innocent of the offense of which he was found guilty by the trial court. Respondent's answer to the trial court's careful, almost anticipatory, inquiry of respondent and his counsel concerning the import of the factual statement read into the record pursuant to the stipulation belies respondent's present posture vis-a-vis that statement.

Numerous affidavits and letters have been submitted in respondent's behalf by lawyers and lay persons alike. Our consideration for respondent's circumstances, however personally sympathetic we may be to his plight and however commendable may be his efforts to rescue himself and in helping to rescue others from the grip of alcoholism, must yield to the regard that we must have for the best interests of the legal profession and for the protection of the public. As we so recently said in Matter of Voorhees, supra:

> In an age where the legal profession is under heavy attack we must have regard for the image of the profession as a whole. A slap on the wrist for the clearly felonious handling of a business act which is cognitive of many acts that a practicing attorney has to perform daily would not lend credibility to the high ethical standards of the profession.

294 N.W.2d at 648.

We conclude that respondent's conduct as manifested by the events that led to his conviction demonstrates that he is unfit to practice law. Accordingly, a judgment of disbarment will be entered.

MORGAN, J., and HALL, Circuit Judge, concur.
HENDERSON and FOSHEIM, JJ., dissent.
HALL, Circuit Judge, sitting for DUNN, J., disqualified.
HENDERSON, Justice (dissenting).

SDCL 23A-27-13 provides:

> Upon receiving a verdict or plea of guilty for a misdemeanor or felony not punishable by death or life imprisonment by a person never before convicted of a crime which at the time of conviction

thereof would constitute a felony in this state, a court having jurisdiction of the defendant, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby may, without entering a judgment of guilt, and with the consent of defendant, suspend the imposition of sentence and place the defendant on probation for such period and upon such terms and conditions as the court may deem best. A court may revoke such suspension at any time during the probationary period and impose and execute sentence without diminishment or credit for any of the probationary period. (Emphasis supplied.)

In absolute contravention to this statute, the court in this case on December 20, 1978, did enter a judgment of guilt as reflected by these words:

JUDGMENT of this Court that the Defendant is GUILTY of attempted Disposal of Mortgage (sic) Property in violation of SDCL 32-3-47.

Thus, I would hold that the judgment of guilt on the original suspension of the imposition of sentence was void ab initio.

SDCL 23A-27-14 states:

Upon completion of the observance of all conditions imposed pursuant to § 23A-27-13, the court service worker assigned to defendant's case shall bring the matter to the attention of the court, whereupon the defendant shall be discharged by the court. A formal entry of such discharge shall be entered by the clerk of courts. Discharge and dismissal under this section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction

of a crime. Discharge and dismissal under this section may occur only once with respect to any person. (Emphasis supplied.)

As the record now stands, respondent has been convicted of absolutely no crime. As I read the majority opinion, it bases its disciplinary action upon the conviction of a crime under SDCL 16-19-33. The November 8, 1979, order provided:

Defendant in the above captioned matter having been found guilty based upon a stipulation of facts on the 15th day of November, 1978, of the offense of Attempted Disposal of Mortgaged Property, and the Court having suspended the imposition of sentence and have place and the defendant on probation on the 15th day of November, 1978, pursuant to SDCL 23-57-4,

It appearing to the Court upon proper showing that the defendant has observed all the conditions of probation imposed by the Court,

IT IS ORDERED that the above-entitled action be, and hereby is, dismissed and the defendant discharged.

IT IS FURTHER ORDERED that all official records in this action be sealed, along with all recordation relating to the defendant's arrest, indictment or information, trial, and dismissal and discharge.

IT IS FURTHER ORDERED that a non-public copy of this ORDER be forwarded to the South Dakota Division of Criminal Investigation, Office of the Attorney General.

IT IS FURTHER ORDERED that the fingerprinting contributor request from the Federal Bureau of Investigation the return to the contributor of all fingerprint identifying data submitted to the Bureau for purposes of disqualifications or disabilities imposed by law for convictions of a crime.

It is to be noted that respondent and his counsel made it perfectly clear that they were not admitting to the facts alleged in the information and that respondent was not pleading guilty to the information. Particularly significant is that the lower court said: "So I don't want to get cross roads here. That-either he is stipulating that these are the facts that if these witnesses were to testify and that the Court can use facts as a basis for entering any finding. Is that correct?" Counsel for respondent answered: "That is correct." And the Court asked: "Is that correct, George?" Respondent answered: "Yes, your honor." The trial court had the right and duty to make a finding but did not have the right to adjudicate guilt which was in absolute derogation of the purpose of a suspended imposition of sentence and contrary to the understanding of respondent and his attorney before the trial judge. (Emphasis supplied).

Furthermore, there was a written plea bargain filed in the lower court on September 11, 1978. Paragraph three provides: "The State of South Dakota will state those facts which it would prove at trial in this matter. Defendant Weisensee will stipulate to those facts, and the court will reach its finding based upon them." (Emphasis supplied).

Paragraph four of this joint plea bargain provided: "Defendant Langloss will plead guilty to the offense charged." Obviously, Weisensee plea bargained for the court to draw findings and Langloss plea bargained to entry of a guilty plea. Weisensee's plea bargain should not have been treated, as it was below, as a plea of guilt. This lawyer has the right to rely on a plea bargain not unlike any other citizen.

In fairness to this lawyer, I wish to point out three findings by the Disciplinary Board in arriving at its recommendation for a suspension from the practice of law for one year:

> 3. That at the time of the respondent's appearance in Court for the purpose of entering the plea to the charges against him, his attorney specifically stated that the facts posed by the stipulation were not admitted to by the respondent but only that those facts were what the State's witnesses would testify to.
>
> 4. That the respondent's agreement to a plea bargain which would give him the suspended imposition of sentence was to a certain degree motivated by his realization that he was a severe alcoholic and was physically very ill and with the understanding that upon his satisfactorily complying with the sentence of the Court that his record would be sealed and purged and he would not then be guilty of a serious crime which would result in his disbarment.
>
> 5. That the respondent's agreement to turn over his license to practice law to the

Supreme Court was understood by the respondent to apply only to his period of probation and that he would be able to request reinstatement upon satisfactorily complying with the conditions of his sentence.

If the "conviction" falls and if there was no finding, and there was not, then what remains to disbar this attorney? If the answer is alcoholism, then the record overwhelmingly shows that his addiction has terminated, as Justice Fosheim points out. If my premise is correct, there is absolutely no presumption of unfitness. The prime purpose of the suspended sentence statutes in this state is to provide a means for nonconviction of a defendant. I do not find the two California cases and the Nevada case cited by the majority opinion to be compelling authority in view of out state statutes. The California statutes differ from ours and the Nevada case piggybacks the California rationale. The pertinent section of the California Business and Professions Code is 6101 which provides:

> Conviction of a felony or misdemeanor, involving moral turpitude, constitutes a cause for disbarment or suspension as provided in section 6102. The record of conviction shall be conclusive evidence. . . .. A plea of or verdict of guilty is deemed to be a conviction within the meaning of this section.

Our statutes do not mandate disbarment upon a conviction.

The majority opinion rests its case, I believe, on this so-called "conviction"; without it, there is no case against the respondent. By the majority opinion, respondent's "unfitness" is inextricably aligned with his "conviction." Therefore, I

would dismiss the disbarment proceeding in totality.

FOSHEIM, Justice (dissenting).

As the majority opinion notes respondent's offense may in large part have been precipitated by the circumstances resulting from his addiction to alcohol. In Matter of Walker, 254 N.W.2d 452 (S.D.1977), we properly refused to condone an attorney's conduct on those grounds. Here, however, upon realizing his problem and where it had taken him, respondent sought and received treatment. It appears he has now successfully abstained from the use of alcohol for over two years. Furthermore, he has become actively involved in programs to aid persons with alcohol or drug-related problems.

When it comes to the discipline to be imposed, I distinguish the circumstances here, for example, with the demonstrated dishonesty of an attorney who misappropriates his client's funds. In the latter case, the lawyer is an out-right thief and there is no point in time when we can protect society with reasonable assurance that he is not likely to repeat his character weakness. On the other hand, before reverting to errors attributable to drinking, an alcoholic is likely to signal a relapse.

It seems to me that the May 12, 1980, supplemental report of the Board recognized this when they mellowed their previous recommendation of disbarment to a one-year suspension with credit for the time already spent under suspension. In view of the circumstances, disbarment appears unduly harsh and fails to lend appropriate encouragement to respondent's

galant rehabilitation efforts. I prefer accepting the Board's recommendation to suspend, but, as an added safeguard, the suspension should be for three years with the recommended credit. Respondent's sobriety should in the meantime be monitored.

APPENDIX B

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

IN THE MATTER OF THE DISCIPLINE OF GEORGE WEISENSEE AS AN ATTORNEY AT LAW	))))	JUDGMENT OF DISBARMENT #12729

WHEREAS pursuant to SDCL 16-19-37, the above-named respondent attorney was suspended from the practice of law by order of this Court dated April 17, 1979, upon the filing of a certified copy of Order Suspending Imposition of Sentence entered by the Circuit Court of the Second Judicial Circuit in a case entitled "State of South Dakota, Plaintiff, v. Conroy Langloss and George Weisensee, Defendants," and

WHEREAS pursuant to SDCL 16-19-39, this matter was referred to the Disciplinary Board of the State Bar of South Dakota on April 17, 1979, for institution of formal proceedings consisting of a written report relating to the underlying circumstances of the felony conviction and a recommendation of the final discipline to be imposed, and

WHEREAS the Disciplinary Board filed such report, together with its recommendation of disbarment, on May 7, 1979, and

WHEREAS, respondent filed his answer to the report and recommendation of the Disciplinary Board on August 17, 1979, and

WHEREAS, the matter was brought on for hearing on November 9, 1979, at which time the parties presented their arguments to the Court, and

WHEREAS by order of November 15, 1979, the matter was again referred to the Disciplinary Board for a supplemental report and recommendation, and

WHEREAS the Disciplinary Board filed such report, together with its recommendation of disbarment, on January 22, 1980, and

WHEREAS the Disciplinary Board consented to a request of respondent to appear before the Board and requested the Court to hold the matter in abeyance pending such appearance and further report of the Board, and

WHEREAS the Disciplinary Board filed a report and recommendation of suspension for a period of one year on May 14, 1980, and

WHEREAS the respondent filed his answer to the report and recommendation of the Disciplinary Board, and

WHEREAS, the reports of the Disciplinary Board, the answers of the respondent and the argument of the parties were thoroughly considered by the Court, and

WHEREAS the Court has on this date entered its decision ordering the disbarment of respondent, now, therefore, in accordance with said dicision, it is

ORDERED and ADJUDGED that George Weisensee be and he is hereby disbarred from the practice of law in any of the courts of this state, and the license to practice law heretofore

granted by this Court to respondent is hereby cancelled and revoked, and respondent shall forthwith surrender his license to practice law to the Clerk of this Court for cancellation, and the Clerk of this Court is authorized and directed to strike the name of George Weisensee from the roll of persons admitted and entitled to practice law in South Dakota.

DATED at Pierre, South Dakota, this 17th day of September, 1980.

BY THE COURT:

ROGER L. WOLLMAN
Chief Justice

ATTEST:

GLORIA J. ENGEL
Clerk of the Supreme Court

(SEAL)

APPENDIX C

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

IN THE MATTER OF THE DISCIPLINE OF GEORGE WEISENSEE AS AN ATTORNEY AT LAW	) AMENDED JUDGMENT OF DISBARMENT #12729

WHEREAS pursuant to SDCL 16-19-37, the above-named respondent attorney was suspended from the practice of law by order of this Court dated April 17, 1979, upon the filing of a certified copy of Order Suspending Imposition of Sentence entered by the Circuit Court of the Second Judicial Circuit in a case entitled "State of South Dakota, Plaintiff, v. Conroy Langloss and George Weisensee, Defendants," and

WHEREAS pursuant to SDCL 16-19-39, this matter was referred to the Disciplinary Board of the State Bar of South Dakota on April 17, 1979, for institution of formal proceedings consisting of a written report relating to the underlying circumstances of the conviction and a recommendation of the final discipline to be imposed, and

WHEREAS the Disciplinary Board filed such report, together with its recommendation of disbarment, on May 7, 1979, and

WHEREAS respondent filed his answer to the report and recommendation of the Discipline Board on August 17, 1979, and

WHEREAS the matter was brought on for hearing on November 9, 1979, at which time the parties presented their arguments to the Court, and

WHEREAS by order of November 15, 1979, the matter was again referred to the Disciplinary Board for a supplemental report and recommendation, and

WHEREAS the Disciplinary Board filed such report, together with its recommendation of disbarment, on January 22, 1980, and

WHEREAS the Disciplinary Board consented to a request of respondent to appear before the Board and requested the Court to hold the matter in abeyance pending such appearance and further report of the Board, and

WHEREAS the Disciplinary Board filed a report and recommendation of suspension for a period of one year on May 14, 1980, and

WHEREAS the respondent filed his answer to the report and recommendation of the Disciplinary Board, and

WHEREAS the reports of the Disciplinary Board, the answers of the respondent and the argument of the parties were thoroughly considered by the Court, and

WHEREAS the Court entered its decision ordering the disbarment of respondent on September 17, 1980, now, therefore, in accordance with said decision, it is

ORDERED and ADJUDGED that George Weisensee be and he is hereby disbarred from the practice of law in any of the courts of this state,

and the license to practice law heretofore granted by this Court to respondent is hereby cancelled and revoked, and respondent shall forthweith surrender his license to practice law to the Clerk of this Court for cancellation, and the Clerk of this Court is authorized and directed to strike the name of George Weisensee from the roll of persons admitted and entitled to practice law in South Dakota.

DATED at Pierre, South Dakota, this 6th day of November, 1980, nunc pro tunc September 17, 1980.

BY THE COURT:

ROGER L. WOLLMAN
Chief Justice

ATTEST:

GLORIA J. ENGEL
Clerk of the Supreme Court

(SEAL)

APPENDIX D

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

IN THE MATTER OF THE DISCIPLINE OF GEORGE WEISENSEE AS AN ATTORNEY AT LAW	ORDER DENYING REHEARING #12729

A petition for rehearing in the above-entitled cause having been filed October 6, 1980, and no issue or question of law or fact appearing to have been overlooked or misapprehended, and more than fifteen days having elapsed therefrom and no written statement having been filed with the Clerk of this Court by a majority of the justices thereof requesting a rehearing, now, therefore, in accordance with the Rehearing Procedure Rule of this Court, the petition for rehearing is denied.

DATED at Pierre, South Dakota, this 6th day of November, 1980.

BY THE COURT:

ROGER L. WOLLMAN
Chief Justice

ATTEST:

GLORIA J. ENGEL
Clerk of the Supreme Court

(SEAL)

APPENDIX E

THE STATE BAR OF SOUTH DAKOTA

February 22, 1980

TO: GEORGE WEISENSEE

NOTICE

NOTICE is hereby given to you, George Weisensee, that the Disciplinary Board of the South Dakota State Bar Association will hold a due process hearing into the matter hereinafter set forth which has come to the attention of said Disciplinary Board. Said hearing is to be held on the 25th day of April, 1980, at 1:00 o'clock P.M., at the Imperial 400 Motel, in Rapid City, South Dakota.

Your presence at said hearing is required by the Disciplinary Board. You may attend with counsel if you so choose.

The matter to be considered is the question of fitness to practice due to the commission of the offense of attempting to dispose of mortgaged property.

Yours very truly,

R. JAMES ZIESER
R. James Zieser
Investigator for the Disciplinary Board

RJZ:gs

APPENDIX F

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
)SS.
COUNTY OF MINNEHAHA) SECOND JUDICIAL CIRCUIT

- -

STATE OF SOUTH DAKOTA, - Cr. 78-28 & CR. 78-247
-
vs. - FINDINGS OF FACT AND
- CONCLUSIONS OF LAW
GEORGE WEISENSEE and - NUNC PRO TUNC
CONROY LANGLOSS, -
-
Defendants. -

- -

It appearing to the Court that the judgment in this matter was entered by the undersigned Judge of the Circuit Court on the 11th day of September, 1978, pursuant to SDCL 23A-27-13 and 23A-27-24 and that an inconsistency exists between the language used by the Court in pronouncing its judgment and the said statute upon which it was based and that said inconsistency might tend to be misleading and that the same was a plain error which the Court now feels should be clarified and corrected, to-wit: The Court used the term "guilty" in bringing the above entitled statute to bear upon the disposition of this case when one of the said statutes, SDCL 23A-27-14 states in part, "this charge and dismissal under this section shall be without Court adjudication of guilt".... the language of the Court and the language of the statute are irreconcilable and the Court intended that the language of the statute should prevail. The Court, at the time, was aware of and approved of, a plea bargain between the State and one of the Defendants, to-wit: George Weisensee, under which the said Defendant agreed to waive trial by jury

and agreed to a stipulated case, without any admission on his part, sufficient to bring him within the purview of the SDCL 23A-27-13 and 23A-27-14; and in reliance upon receiving all of the rights afforded under said statutes, and the Court intending that probation should be based upon an agreement pursuant to said statutes, involving corresponding rights and duties of the Court and said Defendant in the same manner as any other defendant would be involved under said statutes, that is, the rehabilitation of said Defendant, and the Court meaning that the language used by it was intended as a means to comply with the requirements of the statutes and to bring the said Defendant within the purview of said statutes and was not intended to impose an exception to or a qualification of said statutes; now therefore, to clarify any question as to the intent of the Court in disposing of said matter, the Court deems it necessary to make the following Findings of Fact and Conclusions of Law Nunc Pro Tunc, as follows:

Finding of Fact 1.

That this Court had original jurisdiction of this matter and of the Defendant, George Weisensee, and has continuing jurisdiction for the purpose of carrying out the clear intent of this Court and of the understanding between the Court and the Defendant.

Finding of Fact 2.

That the said Defendant entered into a plea bargain with the State of South Dakota, whereby he waived his right to a trial by jury, in reliance upon the Court's making an adjudication qualifying him to come under

the purview of SDCL 23A-27-13 and 23A-27-14 and all of the duties and benefits involved therein.

Finding of Fact 3.

That the Court invoked, pursuant to said plea bargain, the provisions of SDCL 23A-27-13 and 23A-27-14 and placed said Defendant upon probation according to the conditions on file herein as modified, except certain conditions relating to checks which applied only to the Defendant, Conroy Langloss.

Finding of Fact 4.

That pursuant to SDCL 23A-27-14, the Court made and now makes no adjudication of guilt on the part of the Defendant, George Weisensee, any language apparently contradictory thereto, notwithstanding.

Finding of Fact 5.

That the Defendant, George Weisensee, in all things complied with the probationary conditions imposed by the Court.

The Court makes the following Conclusions of Law.

Conclusion of Law No.1.

That the Defendant furlilled all of the requirements of SDCL 23A-27-13 and 23A-27-14 and is entitled to all of the benefits thereunder that any other person would be entitled to, including the following:

> ..."This charge and dismissal under this section shall be without court adjudication of guilt and shall not be

deemed a conviction for purposes of disqualification or disability imposed by law upon conviction of a crime"...

Conclusion of Law No.2.

That the Defendant, George Weisensee, is entitled to discharge and dismissal under SDCL 23A-27-14 and that the record in this case and all orders and judgments relating to this matter should reflect these Findings of Fact and Conclusions of Law.

Dated this 30th day of September, 1980.

BY THE COURT:

IRVIN N. HOYT

Irvin N. Hoyt, Circuit Judge

ATTEST:

Roger D. Moan, Clerk of Courts

By Karla Hall, Deputy

(SEAL)

APPENDIX G

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
)SS
COUNTY OF MINNEHAHA) SECOND JUDICIAL CIRCUIT

- -

STATE OF SOUTH DAKOTA, - CR. 78-28 and CR. 78-247

vs. -

GEORGE WEISENSEE and CONROY LANGLOSS, - JUDGMENT

Defendants. -

- -

The Court having this day made and entered Findings of Fact and Conclusions of Law Nunc Pro Tunc, and upon said Findings and Conclusions, it is hereby,

ORDERED, ADJUDGED and DECREED, that the Complaint and Information be and they hereby are dismissed, and the Defendant George Weisensee, be and he hereby is discharged without adjudication of guilt.

It is further ORDERED, ADJUDGED and DECREED, that the charges contained in CR. 78-28 having been merged with CR. 78-247 by virtue of plea bargain are hereby dismissed.

Dated at Sioux Falls, South Dakota, this 30th day of September, 1980.

BY THE COURT:

IRVIN N. HOYT

Irvin N. Hoyt, Circuit Judge

ATTEST:
Roger D. Moan, Clerk of Courts
(SEAL)

NO. 80-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

GEORGE WEISENSEE,

Petitioner,

v.

THE SUPREME COURT OF SOUTH DAKOTA,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MARK V. MEIERHENRY
ATTORNEY GENERAL
State Capitol
Pierre, South Dakota 57501
Telephone (605) 773-3215

Counsel for Respondents

NO. 80-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

GEORGE WEISENSEE,

Petitioner,

v.

THE SUPREME COURT OF SOUTH DAKOTA,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

QUESTIONS PRESENTED

I

WHETHER ALLEGED PROCEDURAL IRREGULARITIES IN THE DISBARMENT OF PETITIONER BY THE SUPREME COURT OF SOUTH DAKOTA DENIED PETITIONER'S FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND EQUAL PROTECTION.

II

WHETHER THE DISBARMENT OF PETITIONER BY THE SUPREME COURT OF SOUTH DAKOTA CONSTITUTED AN IMPAIRMENT OF CONTRACT IN VIOLATION OF ARTICLE I, SECTION 10 OF THE CONSTITUTION OF THE UNITED STATES; THE "CONTRACT" IN QUESTION BEING PETITIONER'S PLEA BARGAIN WHICH WAS ACCEPTED BY THE STATE TRIAL COURT IN A CRIMINAL ACTION.

PARTIES TO THE PROCEEDING

Petitioner, George Weisensee, petitions for a Writ of Certiorari to review the judgment of disbarment entered against him by the Supreme Court of South Dakota on September 17, 1980, and amended on November 6, 1980, the same date that a Petition for Rehearing was denied. Prior to the judgment of disbarment, Petitioner had been an attorney licensed to practice law in the State of South Dakota.

Respondents are members of the Supreme Court of South Dakota: The Honorable Roger L. Wollman, Chief Justice; The Honorable Francis G. Dunn, The Honorable Jon Fosheim, The Honorable Frank E. Henderson, and the Honorable Robert E.

Morgan, Justices; and the Honorable Philo I. Hall, Circuit Judge, sitting for Justice Dunn, disqualified, at Petitioner's disbarment hearing.

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ADDITIONAL STATUTES INVOLVED

Respondents concur in the statement of Constitutional Provisions Involved and Statutes Involved, as set forth at pages 5-6 of Petition for a Writ of Certiorari, with the following additions:

SDCL 16-19-22:

> The Supreme Court shall have sole power to strike from the roll the name of any attorney and counselor at law and to revoke his license or to suspend him from the practice for such time as shall seem just for cause shown.

SDCL 16-19-36:

> The clerk of any court in this state in which an attorney is convicted of a serious crime shall within ten days of said conviction transmit a certificate thereof to the Supreme Court. The term 'serious crime' shall include any felony and any lesser crime a necessary element of which, as determined by the statutory or common law definition of such crime, involves improper conduct as an attorney, interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a serious crime.

SDCL 16-19-37:

If any attorney has been convicted of a serious crime as defined in § 16-19-36, the Supreme Court shall enter an order immediately suspending the attorney, whether the conviction resulted from a plea of guilty or nolo contendere or from a verdict after trial, or otherwise, and regardless of the pendency of an appeal, pending final disposition of a disciplinary proceeding to be commenced upon such conviction. Upon good cause shown, the Court may set aside such order restraining the attorney from engaging in the practice of law when it appears in the interest of justice so to do. An order suspending an attorney from the practice of law pursuant to this section shall constitute a suspension of the attorney for the purpose of §§ 16-19-74 to 16-19-82, inclusive, unless the Supreme Court shall otherwise order.

SDCL 16-19-38:

An attorney suspended under the provisions of § 16-19-37 will be reinstated immediately upon the filing of a certificate demonstrating that the underlying conviction of a serious crime has been reversed but the reinstatement will not terminate any proceeding then pending against the attorney.

STATEMENT OF THE CASE

A. PRELIMINARY STATEMENT

Petitioner seeks a writ of certiorari to review the judgment of the Supreme Court of the State of South Dakota disbarring Petitioner.[1] Petitioner asserts that alleged procedural irregularities in his disbarment denied Petitioner his Fourteenth Amendment rights to due process and equal protection, and that his disbarment unconstitutionally impaired a "contractual" plea bargain which Petitioner had entered into in a state criminal proceeding.[2]

---

[1] This action concerns only the judgment of disbarment In the Matter of the Discipline of George Weisensee, 296 N.W.2d 717 (S.D. 1980) (Weisensee II), and does not relate to previous disciplinary actions. See In the Matter of The Discipline of George Weisensee, 88 S.D. 544, 224 N.W.2d 830 (1975) (Weisensee I).

[2] The State had originally charged Petitioner with three counts of grand theft and one count of conspiracy based upon unlawful dealing in mortgaged property. Under the terms of the plea bargain, the State dismissed the grand theft and conspiracy charges upon which Petitioner had been indicted and reduced the charge to a misdemeanor, attempted disposal of mortgaged property, on condition that

Petitioner premises his petition on Rule 17(c) of the United States Supreme Court Rules, which provides that certiorari will be granted where the petition sets forth an important federal question which has not been but should be settled by the United States Supreme Court, or where the judgment of the highest state court conflicts with applicable decisions of the United States Supreme Court.

B. PROCEDURAL HISTORY AND RELEVANT FACTS

The procedural history relating to the Petitioner's prosecution for attempted disposal of mortgaged property which resulted in suspended

---

Petitioner surrender his license to practice law to the South Dakota Supreme Court.

The State trial court, by order dated December 20, 1978, suspended imposition of sentence on the misdemeanor charge, placed him on probation for one year, fined him $500, required payment of attorneys fees and outstanding checks, and required weekly attendance at Alcoholics Anonymous meetings. The state trial court did not order Petitioner to surrender his license to practice law.

imposition of sentence, as well as the chronological history of Petitioner's suspension from the practice of law, appearances before the Disciplinary Board of the State Bar, and Petitioner's subsequent disbarment, are set forth in detail in In the Matter of the Discipline of George Weisensee, 296 N.W.2d at 717-721 (S.D. 1980), Appendix A, Petition for Writ of Certiorari, incorporated herein by reference.[3]

SUMMARY OF ARGUMENT

The South Dakota Supreme Court acted within the scope of its authority, and within the bounds of the Constitution of the United States, in disbarring Petitioner. The record adduced at the disciplinary proceeding, including the state

---

[3] There is currently pending in United States District Court, District of South Dakota, Southern Division, a civil rights action alleging due process and equal protection violations resulting from the same judgment of disbarment which is the basis for this Petition for Writ of Certiorari. George Weisensee v. Roger L. Wollman, et al., (CIV 80-4202, U.S. Dist. Ct., D.S.S. 1980, pending).

trial record in Petitioner's criminal prosecution, amply support the Supreme Court's finding that Petitioner's "conduct as manifested by the events that led to his conviction demonstrates that he is unfit to practice law." In the Matter of the Discipline of George Weisensee, 296 N.W.2d 717, 723 (S.D. 1980).

The South Dakota Supreme Court relied on evidence of "the events that led to [Petitioner's] conviction" rather than the conviction per se, in support of its finding of unfitness to practice law. Therefore, Petitioner's argument that suspended imposition of sentence is not a "conviction" in the strict sense of the word, even if accepted, would not have changed the outcome of the disciplinary proceeding. Furthermore, the South Dakota Supreme Court, in interpreting SDCL 23A-27-14, concluded that an order of dismissal of criminal charges entered pursuant to SDCL 23A-27-14 did not operate as a bar to possible institution of disciplinary proceedings

based on the underlying facts which were the basis of the criminal action. Thus, the South Dakota Supreme Court's judgment of disbarment rested exclusively on an interpretation of state law. The disbarment proceeding neither directly nor inferentially raised a substantial federal question.

Minimum due process requirements for attorney discipline were met or exceeded in Petitioner's disbarment proceeding; Petitioner had full notice and opportunity for hearing.

Petitioner's equal protection claim alleging discrimination against lawyers as a class is not clearly developed and has no evidentiary support. Even assuming for the sake of argument that evidence of such discrimination could be produced, the State's interest in insuring the integrity of the attorneys licensed to practice in its courts would provide a rational basis, if not a compelling state interest, justification for the

state licensing authority's broad powers to institute disciplinary actions against attorneys.

Petitioner's assertion that a plea bargain he negotiated in a state criminal proceeding was a "contract" which was unconstitutionally impaired by the institution of disciplinary proceedings after judgment was entered in the state criminal proceeding is unsupported by any legal authority. Respondents submit that even if the plea bargain could be deemed an enforceable "contract," that contract could not be legally binding on persons who were not a party to the bargain (i.e., State Bar Disciplinary Board or the South Dakota Supreme Court). Furthermore, the terms of the plea bargain did not, and could not guarantee that Petitioner would be immune from a disciplinary action instituted by the licensing and disciplinary authority of the State Bar, based on the facts underlying the criminal prosecution. SDCL 16-19-38.

Finally, Petitioner has failed to establish any substantial departure by the South Dakota Supreme Court from the decisions of this Court. Both Konigsberg v. State Bar of California, 353 U.S. 252 (1957) and Schware v. Board of Bar Examiners of the State of New Mexico, 353 U.S. 232 (1957) are legally and factually distinguishable from Petitioner's case.

ARGUMENT

I

PETITIONER HAS FAILED TO RAISE A SUBSTANTIAL FEDERAL QUESTION.

Rule 17(1) of the Rules of the Supreme Court of the United States outlines considerations governing review on certiorari:

> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal

> court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Petitioner relies upon Rule 17(1)(c) as justification for review of his disbarment.

A. Attorney discipline as a state function.

The judgment of disbarment entered against Petitioner by the South Dakota Supreme Court rested exclusively on application and interpretation of state law. Under state law, the ultimate authority to disbar attorneys is vested in

the South Dakota Supreme Court. SDCL 16-19-22. It is "an inherent judicial power, which is as much the law of our land, and of as much dignity as such, as any law found in the Constitution or statutes; it is not dependent on either for its existence but exists fully in all courts of record unless expressly restricted or taken away by specific legislation." Danforth v. Egan, 23 S.D. 43, 119 N.W. 1021 (1909). See also, In re Brown, 64 S.D. 87, 264 N.W. 521 (1936).

The South Dakota Supreme Court has viewed the right to practice law, not as an absolute right, but as a privilege. It is a license granted by the Court upon admission to the bar, and subject to revocation upon a showing of unfitness. The Court has recognized the discipline of attorneys as essential to protect the Court and the public from attorneys who might pervert and abuse the privilege to practice law.

In re Gorsuch, 76 S.D. 191, 75 N.W.2d 644, 57 A.L.R.2d 1355 (1956).

The autonomy of the state judiciary over the members of the state bar has also received recognition in this Court. In Theard v. United States, 354 U.S. 278, 77 S.Ct. 1274, 1 L.Ed.2d 1342 (1957), this Court stated:

> The two judicial systems of courts, the state judicatures and federal judiciary, have autonomous control over the conduct of their officers, upon whom, in the present context, lawyers are included. The court's control over a lawyer's professional life derives from his relation to the responsibilities of the court. The matter was compendiously put by Mr. Justice Cardozo while Chief Judge of the New York Court of Appeals. 'Membership in the bar is a privilege burdened with conditions' (Matter of Rouss, [221 N.Y. 81, 84, 116 N.E. 782]). The appellant was received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice.' People ex rel. Karlin v. Culkin, 248 N.Y. 465, 470, 471, 162 N.E. 487, 489, 60 A.L.R. 851. The power of disbarment is necessary for the protection of the public in order to strip a man of the implied representation by courts

> that a man who is allowed to hold himself out to practice before them is in 'good standing' so to do (emphasis added).

354 U.S. at 281.

Thus, as a general proposition, the discipline of attorneys licensed to practice in state courts is a state, not a federal function.

B. Petitioner's disbarment was based on state, not federal law.

Petitioner's disbarment proceeding neither directly nor inferentially decided any important question of federal law which had not previously been settled by this Court.

The state record contains ample evidence justifying the criminal trial court's acceptance of Petitioner's guilty plea and imposition of suspended imposition of sentence. In the subsequent disciplinary proceeding, evidence of the events that led to Petitioner's conviction, not the conviction per se, was the basis for the Court's finding that Petitioner was unfit to practice law in the State of South Dakota.

In its decision, the South Dakota Supreme Court resolved an important question of state law in holding that the suspended imposition statute, SDCL 23A-27-14, did not operate as a bar to possible institution of a state bar disciplinary proceeding based on the underlying facts which were the basis of the criminal action. Absent some showing of a federal constitutional violation, this Court should not substitute its judgment for that of the state court's interpretation of state statutes.

C. The constitutional issues postulated by Petitioner lack sufficient substance to warrant review on certiorari.

Petitioner alleges that in the course of his disbarment he was denied due process and equal protection in violation of the Fourteenth Amendment, and that his contractual plea bargain was impaired by the disciplinary action of the South Dakota Supreme Court in violation of Article I, § 10 of the Constitution of the United States. The arguments exposing the insubstantial

nature of these claims are found in Arguments II and III, infra. Respondents contend that the issues raised do not in fact present substantial federal questions.

D. The South Dakota Supreme Court's judgment of disbarment does not conflict with applicable decisions of this court.

Although Petitioner alleges that the South Dakota Supreme Court's judgment of disbarment represents a substantial departure from applicable decisions of this Court, his argument fails to develop a genuine conflict with existing case law. Petitioner cites Schware v. Board of Bar Examiners of the State of New Mexico, 353 U.S. 232 at 238 (1957) in support of the proposition that a "state cannot exclude a person from his practice of law . . . in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." Although Respondents endorse that legal principle, they take the position that Petitioner's

disbarment met or exceeded due process requirements, and that the application of state law was not so arbitrary or discriminatory as to deny Petitioner equal protection.

The only decisions of this Court cited by Petitioner in his argument are Konigsberg v. State Bar of California, 353 U.S. 252 (1957); Schware v. Board of Bar Examiners of the State of New Mexico, 353 U.S. 232 (1957); and In re Summers, 325 U.S. 561 (1945). Each of these cases is legally and factually distinguishable from Petitioner's case.

In re Summers, supra, was a review by this Court of the act of the Illinois Supreme Court in denying a consciencious objector's application for admission to the bar based on the applicant's refusal to take an oath to support the Constitution of Illinois. In upholding the Illinois court reaffirmed the general rule in favor of state autonomy in state bar admissions and disciplinary matters:

> The responsibility for choice as to the personnel of its bar rests with Illinois. Only a decision which violated a federal right secured by the Fourteenth Amendment would authorize our intervention.

325 U.S. at 571.

Konigsberg v. State Bar of California, supra, an applicant for admission to the California Bar was denied admission on grounds that the applicant had failed to demonstrate "good moral character" and had refused to answer questions regarding present and past affiliation with the Communist party. This Court found that the evidence before the California admissions committee when it rejected Konigsberg's application for admission did not rationally support the only two grounds upon which it had based its rejection and concluded that the admission committee's actions were so arbitrary and discriminatory as to violate due process and equal protection. The Court stressed that the California admissions committee had trammelled on very sensitive First

Amendment freedoms; freedom of political expression and association:

> We recognize the importance of leaving states free to select their own bars, but it is equally important that the state not exercise this power in an arbitrary or discriminatory manner nor in such way as to impinge on the freedom of political expression or association.

353 U.S. at 273.

Here, however, the factual record amply supports a finding of unfitness to practice. The actions of the South Dakota Supreme Court were neither arbitrary nor discriminatory, and sensitive First Amendment rights are not involved. Konigsberg is therefore distinguishable.

Finally, Petitioner relies upon Schware v. Board of Bar Examiners of the State of New Mexico, supra. In Schware, as in Konigsberg, the Court found a due process violation based on lack of support in the evidentiary record for the grounds for rejection of the bar applicant. In Schware, the Court found "no evidence in the

record which rationally justifies a finding that Schware was morally unfit to practice law." 353 U.S. at 246-7. The evidentiary record before the South Dakota Supreme Court at Petitioner's disbarment did rationally justify that Court's finding that Petitioner was unfit to practice law.

The decision of the South Dakota Supreme Court can be reconciled with each of the decisions of this Court cited by Petitioner.

II

ALLEGED PROCEDURAL IRREGULARITIES IN THE DISBARMENT OF PETITIONER BY THE SUPREME COURT OF SOUTH DAKOTA DID NOT DENY PETITIONER'S FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND EQUAL PROTECTION.

A. Petitioner has presented no substantial due process claim.

A state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the

Fourteenth Amendment. Schware v. Board of Bar Examiners, supra; Konigsberg v. California State Bar, supra.

Procedural due process, that is, the element of the due process provisions of the Fifth and Fourteenth Amendments which relate to the requisite characteristics of proceedings seeking to effect a deprivation of life, liberty, or property may be described as follows:

> One whom it is sought to deprive of such rights must be given notice of the proceedings against him; he must be given an opportunity to defend himself at a hearing, and the proceedings looking toward the deprivation must be essentially fair.

Anno., Suspension or Revocation of Medical or Legal Professional License as Violating Due Process, 98 L.Ed. 851, § 3[a], [b].

Petitioner's disbarment complied with and exceeded the minimum due process requirements of notice, hearing and fairness. The South Dakota Supreme Court suspended Petitioner from

the practice of law pending the final disposition of disciplinary proceedings against him in accordance with the SDCL 16-19-37.[1]

Following SDCL 16-19-39, the Supreme Court referred the matter to the Disciplinary Board of the State Bar.[2] The Board filed its

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[1] SDCL 16-19-37 states: If any attorney has been convicted of a serious crime as defined in § 16-19-36, the Supreme Curt shall enter an order immediately suspending the attorney, whether the conviction resulted from a plea of guilty or nolo contendere or from a verdict after trial or otherwise, and regardless of the pendency of an appeal, pending final disposition of a disciplinary proceeding to be commenced upon such conviction. Upon good cause shown, the Court may set aside such order restraining the attorney from engaging in the practice of law when it appears in the interest of justice so to do. An order suspending an attorney from the practice of law pursuant to this section shall constitute a suspension of the attorney for the purpose of §§ 16-19-74 to 16-19-82, inclusive, unless the Supreme Court shall otherwise order.

[2] SDCL 16-19-39 states: Upon the receipt of a certificate of conviction of an attorney for a serious crime, the Supreme Court shall, in addition to suspending him in accordance with the provisions of § 16-19-37, also refer the matter to

report on May 3, 1979, recommending that the Petitioner be disbarred. Following two extensions of time for answering granted to Petitioner's counsel, Petitioner on August 16, 1979, filed an answer on his own behalf. Petitioner's counsel later withdrew as counsel of record.

A hearing on the Board's report and recommendation was set for October 15, 1979. Petitioner failed to appear on that date, and in lieu of an appearance tendered his resignation from the State Bar. The Supreme Court refused to accept Petitioner's resignation. The hearing on the Board's report and recommendation was then rescheduled for November 9, 1979. Petitioner represented himself at that hearing.

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the board or the attorney general for the institution of a formal proceeding in which the sole issue to be determined shall be the extent of the final discipline to be imposed, provided that a disciplinary proceeding so instituted will not be brought to hearing until all appeals from the conviction are concluded.

Following the hearing, the South Dakota Supreme Court entered an order directing Petitioner to file with the Court an affidavit setting forth certain facts brought out at the hearing. The order also directed that the matter be remanded to the Board for its consideration of the additional factual matters that had been presented to the Court by Petitioner at the hearing.

On January 22, 1980, the Board renewed its recommendation that Petitioner be disbarred. Petitioner challenged the Board's investigation and was allowed the opportunity to appear before the Board on April 25, 1980. Following that hearing the Board submitted to the Court a supplemental report recommending, among other things, that Petitioner be suspended from the practice of law for one year with credit for time already spent under suspension. The Court entered a judgment of disbarment on September 17, 1980.

Proceedings to suspend or revoke a legal professional license are free of any due process defects so far as procedure is concerned so long as the basic requisites of notice and hearing are complied with; the form of the notice and hearing is immaterial. Wilbur v. Howard, 70 F.Supp 930, (D.C. Ky.), revd. on other grounds, 166 F.2d 884 (6th Cir. 1947).

The South Dakota Supreme Court in its disbarment proceedings against Petitioner provided Petitioner both notice and an opportunity to be heard in satisfaction of Petitioner's due process rights.

B. Petitioner has presented no substantial equal protection claim.

The Petitioner raises but fails to develop any claim under the Fourteenth Amendment's equal protection clause. Even assuming that a statutory classification exists in the disciplinary statutes, no violation of the equal protection clause has been established.

The United States Supreme Court has held that the Fourteenth Amendment to the United States Constitution a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. McGowan v. Maryland, 366 U.S.420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961).

Regarding the right to practice law as not an absolute right but rather as a privilege governed by statute, it could not be deemed to be a fundamental right rooted in the Constitution. Harper v. Virginia State Board of Elections, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966). The test of strict judicial scrutiny is reserved for cases involving laws which operate to disadvantage suspect classes or interfere with the exercise of fundamental rights and liberties explicitly or implicitly protected by the Constitution. San Antonio School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973), reh. denied,

411 U.S. 959, 93 S.Ct. 1919, 36 L.Ed.2d 418. Therefore, use of traditional equal protection analysis is mandated.

Under traditional equal protection analysis, a mere classification by itself is not enough to establish a violation of the Equal Protection Clause of the Fourteenth Amendment. Carrington v. Rash, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965). A legislative classification must be sustained if the classification itself is rationally related to a legitimate government interest. United States Department of Agriculture v. Moreno, 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973). The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. McGowan v. Maryland, supra. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some

inequality. A state statute should not be set aside if any state of facts reasonably can be conceived to justify it. McGowan v. Maryland, supra. Statutes should be be construed whenever possible so as to uphold their constitutionality. United States v. Vuitch, 402 U.S. 62, 91 S.Ct. 1294, 28 L.Ed.2d 601 (1971).

The Petitioner complains of no specific classification in the disciplinary statutes. Even if one existed, e.g., lawyers vs. non-lawyers, the Respondents would argue that it is rationally related to the state's legitimate interest in supervising and maintaining standards of professional competence by placing discipline of state bar members exclusively in the State Supreme Court. Absent specificity, however, Petitioner has failed to state a claim upon which relief could be granted.

III

PETITIONER'S DISBARMENT DID NOT CONSTITUTE AN IMPAIRMENT OF CONTRACT.

Petitioner argues that his disbarment in some unspecified manner impaired his "contractual" plea bargain in violation of Article I, Section 10 of the Constitution of the United States. Petitioner cites no authority in support of this claim.

Assuming solely for the sake of argument that a plea bargain might constitute a "contract" within the meaning of Article I, § 10, Petitioner has failed to establish that the State in any way impaired his contractual plea bargain.

The terms of the plea bargain, simply stated, were that the State would dismiss the four felony charges for which Petitioner had been indicted and reduce the charge to a misdemeanor. Petitioner agreed to surrender his license to practice law to the South Dakota Supreme Court. There was no agreement to bar the State Bar Disciplinary Board from taking disciplinary measures had there been such an agreement, it would have been unenforceable since it would be totally

beyond the authority of a prosecutor to bargain away the disciplinary jurisdiction of the State Bar Disciplinary Board and the South Dakota Supreme Court. The only parties to the bargain were the prosecutor and the Petitioner. The bargain was accepted by the state trial court, and after receiving Petitioner's guilty plea, suspended imposition of sentence was imposed pursuant to SDCL 23A-27-13. Neither the State Bar Disciplinary Board nor the South Dakota Supreme Court were parties to the agreement. No terms or conditions in the plea bargain limited the disciplinary jurisdiction of the South Dakota Supreme Court.

Petitioner's allegation that the South Dakota Supreme Court abridged the plea bargain is not tenable. The South Dakota Supreme Court did not affect the state trial court's adjudication in the criminal action. The South Dakota Supreme Court merely relied in part on the

factual record of the criminal proceeding in support of its finding that Petitioner was unfit to practice law. Furthermore, in light of SDCL 16-19-38, which provides that pending disciplinary actions based on criminal conduct are not terminated when the underlying conviction is reversed, it would allow the disciplinary action against Petitioner to continue after suspended imposition conditions are met.

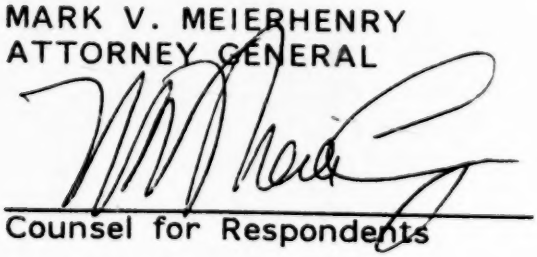
This Court has held that there is no constitutional right to engage in plea bargaining. Weatherford v. Bursey, 429 U.S. 545 (1977).

CONCLUSION

Respondents respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

MARK V. MEIERHENRY
ATTORNEY GENERAL



Counsel for Respondents

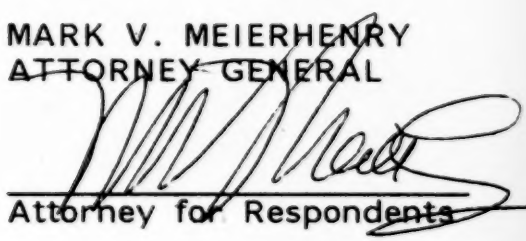
CERTIFICATE OF SERVICE

I hereby certify that three copies of Respondents' Brief in Opposition to Petition for a Writ of Certiorari were served by United States mail, first class, postage prepaid, upon Mr. L. Anthony Weisensee, 108 North Phillips Avenue, Sioux Falls, South Dakota, 57102, attorney for Petitioner.

In addition, I hereby certify that all parties required to be served have been served.

Dated this 4th day of March, 1981.

MARK V. MEIERHENRY
ATTORNEY GENERAL



Attorney for Respondents